HAMZAH D.494 & ORS. v. WAN HANAFI BIN WAN ALI

[F.C. (Suffian L.P., Ali and Wan Suleiman F.JJ.) January 16, 1975]

[Kota Bharu — Federal Court Civil Appeal No. 148 of 1973]

Tort — Negligence — Degree of care required varies with the risk involved — Standard of reasonable care — Common practice of Malayan Railways.

Railways — Passengers — Notices warning passengers not to travel on the steps, gangways or verandahs — Common practice.

This was an appeal by the appellants against the judgment of the High Court, in which it was held that the Malayan Railway Administration and its officers were negligent because they had not taken reasonable steps to prevent passengers to be at or near the steps of the train, when they were aware that it was quite normal practice for passengers to alight from the train whilst it was still in motion. The respondent had been injured when he attempted to get off the train before it came to a stop.

Held, allowing the appeal; the steps taken by the appellants to prevent passengers from being at or near the steps were reasonably adequate in the circumstances and therefore the appellants were not negligent.

Cases referred to:-

(1) *Glasgow Corporation* v. *Muir* [1943] A.C. 448 at p. 456.
(2) *Latimer* v. *A.E.C. Ltd.* [1953] A.C. 625.
(3) *Harves* v. *Railway Executive* (1952) 96 Sol. J. 852.
(4) *Walt* v. *Hertfordshire County Council* [1954] 2 All E.R. 368.
(5) *Daborn* v. *Bath Tramways* Ltd. [1946] 2 All E.R. 333, 336.
(6) *Mahon* v. *Osborne* [1939] 2 K.B. 14, 43.
(7) *Vancouver General Hospital* v. *McDavid* (1934) 152 L.T. 56, 57.

FEDERAL COURT.

K. Thayalan for the appellants.

A. Wilson for the respondent.

Wan Suleiman F.J. (read by **Suffian L.P.**): We are inclined to the view that plaintiff was wholly to blame for the accident.

The learned trial judge had remarked that "Though the plaintiff had denied it I am satisfied from the whole of the evidence before me that he had either been travelling on the gangway throughout the journey or had come out from inside the coach while the train was in motion and had gone to or near the steps (footboards) when the train was approaching the station and that the accident had taken place when he alighted from the train while it had not yet come to a stop. There is ample evidence to show that there were many passengers standing at or near the gangways (and also the doorways) while the train was in motion. Plaintiff and PW2 had both said so and DW2 had said that local passengers were in the habit of standing there and that on the day in question there were lots of them standing there. DW3 had also said so. Though DW2 could not say if there were passengers standing on or near the steps as well while the train was in motion I am satisfied that there were such passengers. DW1 had said that it was quite common and DW2 had said that it was the practice for passengers to jump from the train before it stopped and in my view unless they were already on or near the steps most of them certainly would not be in a position to do so."

He also found strong evidence, apart from the effect of D4 (the written statement made by the plaintiff on 8 March, 1969 whilst he was still in hospital) to show that plaintiff's contention that he had fallen because the train had moved again after it first stopped was untrue, the evidence indicating that he must have fallen whilst the train had not yet come to a stop.

His Lordship must have accepted in part the plaintiff's claim that he had at least for some portion of his journey travelled inside the coach, because in dealing with the issue of overcrowding, he said "I am inclined to agree with him (DW1, the guard) because though the train was crowded plaintiff himself managed to get a standing space inside the coach and so had his witness PW2 and PW3. I am therefore not satisfied that the train was overcrowded."

Be that as it may, the learned trial judge found that the defendants were negligent "because they had not taken reasonable steps to prevent and thereby allowed the passengers, and in particular the plaintiff to be at or near the steps, when they were aware that it was quite normal practice for passengers to alight from the train whilst it was still in motion".

He had come to this conclusion after considering the steps which the appellants had taken to keep passengers from being near the steps, gangways or verandahs of the train. We cite that part of his judgment:

"The defendants had relied on the notices D1 and D3 which warned the passengers not to travel on the steps, gangways or verandahs of coaches as it was dangerous to do so and to wait until the train stopped before alighting respectively and DW 3 had also said that he and his assistants had advised those passengers of such danger. It is however clear that both the written warnings and the advice given by DW 3 and his assistants had been persistently ignored by the passengers. More therefore should have been done to clear the passengers from the gangways and the steps so as to prevent them from alighting from the train while the train was in motion but DW 3 himself had admitted that he had not even reported the matter to more senior and responsible officers and that he did not know if those officers knew of it. Furthermore plaintiff had said that he could not read those notices and it is not seriously disputed that quite a number of the passengers in that train were not able to read and write."

To determine whether the learned judge was not setting too high a standard of care in the circumstances of this case, we propose to examine some general principles of the law of negligence.

In *Halsbury's* Laws of England 3rd Edn. Vol. 28 pages 1 and 2 under the sub-heading "meaning of negligence" appears the following passage.

"Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case, and the categories of negligence are never closed. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all.... The degree of care required in the particular case depends on the accompanying circumstances, and may vary according to the amount of risk to be encountered...."

The authority for this latter proposition is the House of Lords decision in *Glasgow Corporation* v. *Muir*,[1] where Lord Macmillan said —

"My Lords, the degree of care for the safety of others which the law requires human beings to observe in the conduct of

their affairs varies according to the circumstances. There is no absolute standard, but it may be said generally that the degree of care required varies directly with the risk involved. Those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life...."

On page 11 of the same volume of *Halsbury* under the subhead "Reasonable care" appears this passage: —

"In ordinary circumstances, or where simple operations are being performed, persons are not as a rule required to guard against every conceivable result of their actions, nor are they bound to exercise scientific care or to take extravagant precautions. They must have regard both to the probability of injury resulting, and to the probable seriousness of the injury. They may weigh the cost and the difficulties of the precautions. They are in general entitled to assume that others will comply with statutory regulations...."

Thus, the defendant may not be bound to close a factory because the floor is slippery (*Latimer* v. *A.E.C. Ltd.*[2]), or to immobilise an electric railway for a minor repair (*Harves* v. *Railway Executive*[3]), or to ensure the safe construction of a vehicle used by the fire service in an emergency (*Walt* v. *Hertfordshire County Council*[4]).

In the present case the railways provide a cheap and quick means of transport for residents of that part of the East Coast. The railway rules require that a clear passageway be kept from one end of the train to the other.

As learned counsel for the appellants submitted at the trial, the only way to ensure that no passenger stood on the gangway was to place a railway official at each door throughout the train and to manhandle and herd passengers into their coaches so as to ensure that they would remain inside between stations. In order to restrain passengers such as the respondent from dashing out of coaches for the steps while the train is moving into a station, the doors would have to remain shut until the train comes to a halt. Such additional precautions though feasible would be extravagant in both time and expense, and would defeat the purpose of providing cheap and efficient public transportation.

Guards would thus have to be posted at the doors at each end of the corridor, in trains with only corridor doors, and others at side doors if any throughout the train to ensure that all passengers remain within the coaches at all times whilst the train is in motion.

"In considering the difficulty, or cost, of remedial measures it is necessary to take into account not only the risk but also the importance of the object to be attained by the activity which creates the risk. If the activity in question is of little or no national importance, it might be that cost should not be taken into account, but in other cases there must be a point, as in practice there is, beyond which further remedial measures are prohibitive by reason of cost. A slight risk may be run if the cost of remedying it is unreasonably high, but the greater the risk the greater must be the cost of remedying it before remedial measures can be dispensed with. It is a question of degree in each case to be considered together with the importance of the end to be attained."

(*Charlesworth* on Negligence — Third Edition page 28 paragraph 49).

In *Daborn* v. *Bath Tramways Ltd.*,[5] Asquith J. said:

"In determining whether a party is negligent, the standard of reasonable care is that which is reasonably to be demanded in the circumstances. A relevant circumstance to take into account may be the importance of the end to be served by behaving in this way or in that. As has often been pointed out, if all the trains in this country were restricted to a speed of 5 miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk."

A balance, in our view has to be struck between the very purpose of providing this means of transport, and the negligible risk of injury which failure to take the more elaborate and costly precautions might entail.

"Common practice by persons habitually engaged in a particular operation is strong evidence of what is reasonable care in the performance of that operation." (*Mahon* v. *Osborne*[6]).

In *Vancouver General Hospital* v. *McDavid*[7] Lord Alness said:

"A defendant charged with negligence can clear (himself) if he shows that he has acted in accordance with general and approved practice."

The common practice of the Malayan Railways, mostly embodied in its rules and regulations in respect of the precautions taken for the physical wellbeing of passengers was described by Fonseka, the Guard (DW2) and in greater detail by the District Traffic Superintendent, Krai.

We would say that the evidence of the two, of a standard of care which had apparently stood the test of time as being both reasonably safe and practicable, has not been given the weight it deserves.

It is our considered opinion that the steps taken by the appellants to prevent passengers including the plaintiff from being at or near the steps were reasonably adequate in the circumstances, and that the appellants were therefore not negligent.

We would therefore, with respect allow the appeal and dismiss the cross-appeal, with costs.

Appellants' deposit back to appellants.

Appeal allowed.

Solicitors: *Skrine & Co.; Wilson & Co.*

TAN THANG SANG v. PUBLIC PROSECUTOR * CHOONG SZE FOONG v. PUBLIC PROSECUTOR

[A.C.J. (Ong C.J. (Malaya)) May 5, 1973]
[Kuala Lumpur — Selangor Criminal Appeals Nos. 26 and 28 of 1973]

Road Traffic Ordinance 1958, s. 34A — Dangerous driving — Punishment — Creditability of witness.

Criminal Law and Procedure — Sentence — Exemplary sentence in terrorem — Deterrence.

In these proceedings, the appellants appealed against conviction on a charge for dangerous driving under section 34A of the Road Traffic Ordinance, 1958 and against sentence.

Held: (1) the driving is not necessarily dangerous because it leads to fatal consequences but a verdict of guilt can only follow a finding of fault on the part of the driver;

* We are grateful to M/s Sharikat Pritam Singh of drawing our attention to this case and supplying us with a copy of the judgment.